Current Limitations on Governmental Invasion of First Amendment Freedoms

Despite the fact that no important case involving First Amendment freedoms was decided by the Supreme Court prior to 1919, judicial protection of constitutional rights of privacy has involved ever increasing litigation and what appears to be ever increasing confusion in the cases. Behind the great mass of litigation in this field and the at least surface confusion of the cases lie two great dilemmas. The first is that posed so well by Abraham Lincoln, "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" The second is that dilemma so peculiar to every field of the law; the desire for certainty in legal principles on the one hand, and the desire for justice in the individual case on the other.

With these conflicts as a background, the Supreme Court has arrived at a solution of First Amendment cases which can be described as a process rather than a set of "inexorible" rules. The Court has recognized that, in essence, the problem is one of weighing the interests of the individual in maintaining his liberties as against the interests of the State in protecting the community. "A survey of the relevant decisions indicates that the results which we have reached are on the whole those that would ensue from careful weighing of conflicting interests."[1]

The Court in each case, then, must decide whether the rights of the individual should be protected or whether there is a public interest justifying or overriding the accompanying invasion of individual rights. As the Court has stated it:

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[1] Dennis v. United States, 341 U.S. 494, 542 (1951). The necessity of a weighing or balancing process has often been emphasized by the Court. "We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, . . . against the interest of the community . . ." Martin v. City of Struthers, 319 U.S. 141, 143 (1943). "The demands of free speech in a democratic society as well as the interest in the national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas." Dennis v. United States, 341 U.S. 494, 542 (1951). See also Dennis v. United States, 341 U.S. 494 at 519, 525, 542, 543, and 561 (1951); American Communications Association v. Douds, 339 U.S. 383 at 393 and 400 (1950); Teamsters Union v. Hanke, 339 U.S. 470, 474 (1950); Pennekamp v. Florida, 328 U.S. 331, 336 (1946).

> . . . the problem is the relative necessity of the public interest as against the private rights. Even assuming private rights of the timid to be of the fullest weight, the problem remains whether they outweigh the public necessities in this matter.[2]

This process of balancing the individual interests as against the public interest of necessity involves a consideration of many factors. As the Court itself has said, "The complex issues presented by regulation of speech (and this is true of all First Amendment freedoms) in public places, by picketing, and by legislation prohibiting advocacy of crime have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened."[3]

Understanding First Amendment decisions, then, involves two problems; comprehending the basic balancing process involved, and recognizing the various factors which the Court uses in that process as well as their significance. This comment will treat those two problems in reverse order, with a final section intended to synthesize the factors and thus present a picture of the complete balancing process involved.[4] While it is true that any discussion of First Amendment decisions completely divorced from questions of policy and of jurisdiction, both in the power and the ought sense, cannot present the whole picture, it is hoped that this comment may make some contribution toward an understanding of at least the mechanics of First Amendment decisions.

Individual Interest

Before an individual's personality rights will be constitutionally protected, there must at least have been a *factual* invasion of them. Despite an assertion by the individual that his personality rights have been invaded, the Court on analysis may decide that there has, in fact, been no invasion. When they so decide, the Court, of course, need consider nothing else in so far as the First Amendment is concerned. Where, however, the Court is convinced that a factual invasion of personality rights has occurred, they must then weigh the individual interest in preventing that invasion. The cases indicate that in weighing the individual interest in a particular case the Court may consider three factors: the aspect of personality invaded, the magnitude of the invasion, and the appropriateness of the invasion. These factors will be considered in detail below.

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2 Barsky v. United States, 167 F. 2d 241, 249 (D.C. Cir. 1948), *cert. denied,* 334 U.S. 843 (1948).

3 Dennis v. United States, 341 U.S. 494, 542 (1951).

4 The analysis and ideas expressed in this comment are largely based on the analysis of Professor Frank R. Strong of The Ohio State University as presented in his book American Constitutional Law (1950).

The Aspect of Personality Invaded.

This factor includes a recognition that there are various aspects of personality which receive constitutional protection, and a determination of the relative importance and corresponding protection of the particular aspect invaded in each case. There are, of course, many aspects of personality, and categorizing them depends upon the use to which the resulting categories will be put. Relevant here, therefore, are only those facets of personality which the Supreme Court has accorded constitutional protection. These can be classified into four basic aspects: (1) bodily integrity or the person,[5] (2) spiritual integrity or the mind, the spirit and the soul,[6] (3) physical integrity or the right of external physical privacy,[7] and (4) reputational integrity or the right of reputational privacy.[8] Within each of these four aspects of personality are many different but related activities; for instance, religion, itself only a part of spiritual integrity, is expressed through many different activities. These varying activities are not identically protected, but receive different degrees of protection according to judicial conceptions of the social importance of the particular activity. Each aspect of personality, therefore, may receive a range of constitutional protection determined by the range of social importance of

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5 U.S. CONST. AMEND. XIII, §1; U.S. CONST. AMEND. XIV, §1. "No State 'shall deprive any person of life, liberty, or property without due process of law,' says the Fourteenth Amendment to the Constitution. By the term 'life' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to every one with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decison." Field, J., dissenting in Munn v. Illinois, 94 U.S. 113, 142 (1877).

6 "The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them." Mr. Justice Stone dissenting in Minersville School District v. Gobitis, 310 U.S. 586, 604 (1940).

7 "The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society . . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." Mr. Justice Frankfurter delivering the opinion of the Court in Wolf v. Colorado, 338 U.S. 25, 27 (1949).

8 "Analyzed, freedom to remain silent is essentially freedom from the embarrassment and mental suffering which flows from enforced disclosure of personal oddity or social non-conformity; . . . ." STRONG, CONSTITUTIONAL LAW 773 (1950). See *The Right of Privacy*, 4 HARV. L. REV. 193 (1890); Pound, *Interests of Personality*, 28 HARV. L. REV. 445 (1914).

the activities within the aspect. Since this paper is limited chiefly to a discussion of First Amendment Rights, only spiritual integrity will be treated in detail below.

(1) *Bodily integrity.* Of the four aspects of personality, bodily integrity was the first to receive constitional protection, and has since received the highest degree of protection. Illustrating this high degree of protection is the fact that the Thirteenth Amendment which safeguards bodily integrity is the only Amendment operating directly against invasions by individuals as well as against invasions by government.

(2) *Spiritual integrity.* This aspect of personality is second only to bodily integrity in the quantum of protection accorded by the Constitution. The Supreme Court has often expressly emphasized the importance of this aspect.[9] Spiritual integrity, of course, covers a very wide range of human activities,[10] and not every activity within its ambit is as fully protected as every other activity. For freedom of speech, this concept has been well stated by Mr. Justice Frankfurter in the recent *Dennis* case, "Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting certain kinds of utterances: 'the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace'."[11] The even more recent case of *Beauharnais v. Illinois*[12] emphasizes this distinction, and adds to the "lewd and obscene" group libel or race defamation.

Freedom of religion and assembly likewise are composed of various activities which receive different degrees of protection. As stated by

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9 Thomas v. Collins, 323 U.S. 516 (1945); Schneiderman v. United States, 320 U.S. 118 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); Near v. Minnesota, 283 U.S. 697 (1931).

10 "The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." Lovell v. City of Griffin, 303 U. S. 444, 452 (1937); "We have no doubt that motion pictures, like newspapers and radios, are included in the press whose freedom is guaranteed by the First Amendment." United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); As to movies see also Burstyn, Inc. v. Wilson, 20 L.W. 4329 (1952). "Section 9(h) . . . has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment." American Communications Association v. Douds, 339 U.S. 382, 393 (1950); ". . . Congress has never deemed it wise, if, indeed, it has considered it constitutional, to interfere with the civil right of using the mail for lawful purposes." Mr. Justice Brandeis dissenting in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 423 (1921); "There is no doubt that, in connection with the pledges, the flag salute is a form of utterance." West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943).

11 341 U.S. 494 at 544 (1951).

12 72 S.Ct. 725 (1952).

the Supreme Court in *Cantwell v. Connecticut*, "Thus the Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."[13]

Distinctions among the different activities composing an aspect of personality seem based on the value to society of the particular activity. As Professor Chafee has stated it, "The First Amendment protects two kinds of interest in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[14] The Supreme Court has clearly indicated that the "individual" interest in freedom of speech is not as highly protected as the "social" interest. In speaking of profanity, the Court has said, "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[15]

Thus the Court does not stop with a bare determination that spiritual integrity has been invaded, but goes on to determine the social importance of the particular activity invaded. Only then can the Court determine the degree of constitutional protection to which that activity is entitled.

(3) *Physical integrity.* The cases indicate that this aspect ranks below spiritual integrity on the scale of protection accorded rights of personality.[16] The protection which this aspect receives stems from the Fourth and Fifth Amendments, but, at present, that protection is given effect only through the sanction of the federal rule against the

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13 310 U.S. 296, 303 (1940).

14 CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1941).

15 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). It may be that cursing receives no constitutional protection whatsoever, for in the Chaplinsky case the Court quoted with approval from Cantwell v. Connecticut, 310 U.S. 296 at 309-310 (1940): "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." It is clear, however, that if such forms of expression receive any constitutional protection, it is less than that afforded other forms of expression, "A man who is calling names or using the kind of language which would reasonably stir another to violence does not have the same claim to protection as one whose speech is an appeal to reason." Niemotko v. Maryland, 340 U.S. 268, 282 (1951).

16 "Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures." Mr. Justice Douglas dissenting in Beauharnais v. Illinois, 72 S.Ct. 725, 745 (1952).

admissibility of illegally obtained evidence.[17] Since this rule is not mandatory on the states, it is obvious that physical integrity receives less constitutional protection than either bodily or spiritual integrity.

(4) *Reputational integrity.* The only effective protection given this aspect at present lies in the constitutional privilege against self-incrimination,[18] which protects individuals only as against criminal reputation. Currently, however, there is an effort to achieve for this type of integrity a protection greater than the limited protection now possible under that privilege. The effort consists of an attempt to link "the right to remain silent" with freedom of speech, freedom of conscience, or both. Manifesting this effort is Mr. Justice Murphy's concurring opinion in *West Virginia State Board v. Barnette,* "The freedom of thought and of religion as guaranteed by the Constitution against state action includes both the right to speak freely and the right to refrain from speaking at all . . . ."[19] At present, however, the cases make it extremely doubtful that any constitutional guaranty of reputational integrity exists beyond that accorded by the privilege against self-incrimination.[20]

> The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Consitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends noncomformity, whether in religion, politics, behavior or dress.[21]

(5) *Summary.* Four aspects of personality are currently given substantive constitutional protection. These are bodily, spiritual, physical and reputational integrity. In First Amendment cases, the Court first decides whether or not there has been a factual invasion. It then considers the particular activity invaded and accords it a degree of protection corresponding with its importance to society. If there is to be a true balancing of the individual interest as against the public interest, the Court must consider the particular activities invaded,

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17 Wolf v. Colorado, 338 U.S. 25 (1949); Weeks v. United States, 232 U.S. 383 (1930).

18 U.S. CONST. AMEND. V. Technically the Fifth Amendment is not applicable to the states. Brown v. Mississippi, 297 U.S. 278 (1936).

19 319 U.S. 624, 645 (1943). For an attempt to justify a "liberty of silence" on the basis of the due process clause, see Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs,* 47 MICH. L. REV. 181 (1948).

20 Curtis, *Wringing the Bill of Rights,* 2 THE PAC. SPECTATOR 361, 368-370 (1948).

21 Mr. Justice Jackson concurring in McCollum v. Board of Education, 333 U.S. 203, 232 (1948).

since only in that way can the importance of preventing an invasion of those activities be determined.

Magnitude of the Invasion.

The key to this second factor is the scope or thrust of the invasion. Although pertinent in determining the constitutionality of invasions of all four of the aforementioned aspects of personality,[22] this factor will be here treated only as it is applied in First Amendment cases, or those cases involving spiritual integrity.

Historically the Court resisted a consideration of magnitude. The decisions merely indicated that there was or was not a factual invasion of First Amendment freedoms.[23] Since the middle 1930's, however, there has been a definite trend toward a more flexible basis of determination. After finding a factual invasion, the Court will go on to determine how great that invasion has been in terms of the particular activity invaded. Although of relatively recent origin, this factor has been expressly treated in several Supreme Court decisions which clearly illustrate its significance.

In *Bridges v. California*[24] the Court, in reversing contempt convictions arising out of published comments made regarding pending litigation, was influenced by its judgment that the magnitude of the invasion of First Amendment freedoms was great:

> We may appropriately begin our discussion of the judgments below by considering *how much,* as a practical matter they would effect liberty of expression. . . . Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.[25] (Emphasis supplied).

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22 As to bodily integrity see Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachusetts, 197 U.S. 11 (1905). As to physical integrity see Harris v. United States, 331 U.S. 145 (1947); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); Olmstead v. United States, 277 U.S. 438 (1928). As to reputational integrity see concurring opinion of Mr. Justice Jackson in McCollum v. Board of Education, 333 U.S. 203, 232 (1948).

23 Near v. Minnesota, 283 U.S. 697 (1931); Schenck v. United States, 249 U.S. 47 (1919); "Do the people of this land . . . desire to preserve . . . freedom of speech and of the press . . . ? If so, let them withstand all *beginnings* of encroachment." Dissenting opinion of Mr. Justice Southerland in Associated Press v. National Labor Relations Board, 301 U.S. 103, 141 (1937). (Emphasis supplied).

24 314 U.S. 252 (1941).

25 *Id.* at 268.

In *American Communications Association v. Douds*,[26] the Court upheld the constitutionality of Section 9 (h) of the National Labor Relations Act of 1937. Again the magnitude of the invasion of First Amendment rights was an important factor in the decision, although this time the Court felt that that magnitude was small:

> When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is *relatively small* and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity.[27] (Emphasis supplied).

In upholding the Hatch Act challenged in *United Public Workers of America (C.I.O.) v. Mitchell*,[28] the Court stressed their judgment that the magnitude of the invasion of personality rights was slight. "Congress . . . leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act."[29] Significantly, Mr. Justice Black based his dissent in large part on his judgment that the magnitude of the invasion was extremely great. "Thus are the families of public employees stripped of their freedom of political action. The result is that the sum of political privilege left to government and state employees, and their families, to take part in political campaigns seems to be this: They may vote in silence; they may carefully and quietly express a political view at their peril; and they may become 'spectators' (this is the Commission's word) at campaign gatherings, though it may be highly dangerous for them to 'second a motion' or let it be known that they agree or disagree with a speaker."[30]

Significant also in a discussion of the magnitude factor are those cases in which governmental action invading personality rights has been held unconstitutional because of its sweeping proscription or uncertain, all-inclusive standards.[31] Although these cases are traditionally explained by the "void for vagueness," rule or by the argument that permitted activities as well as evils are prohibited, the language

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26 339 U.S. 382 (1950).

27 *Id.* at 397.

28 330 U.S. 75 (1947).

29 *Id.* at 99.

30 *Id.* at 108.

31 Termineniello v. Chicago, 337 U.S. 1 (1949); Winters v. New York, 333 U.S. 507 (1948); Cafeteria Union v. Angelos, 320 U.S. 293 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); De Jonge v. Oregon, 299 U.S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S., 359 (1931).

of several of these cases has indicated a concern with the concept of magnitude. In this connection the rationale is that a sweeping proscription must necessarily be of the great magnitude due to the wide range of activities which it prohibits. Illustrative of this approach is the language of the Court in *Drivers Union v. Meadowmoor Co.*, "The exercise of the state's power which we are sustaining is the very *antithesis of a ban on all discussion* in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this *narrow area* precisely because the coercive conduct affected it."[32] A further example of the relation between indefinite standards and magnitude is the approach used by the Court in *Cantwell v. Connecticut*.[33] In that case a Connecticut statute forbidding solicitation of money or valuables for any alleged religious cause without a certificate first obtained from a designated official was held unconstitutional. The Court, after approving the power of the states to "regulate the time and manner of solicitation generally," went on to indicate that conditioning solicitation in its entirety on first obtaining a license from an official, who, because of a lack of definite standards, could exercise discrimination made the magnitude of the particular invasion of freedoms too great.

Thus, an examination of First Amendment cases since the early 1930's leads to the conclusion that the Court is no longer satisfied with the bare determination that there has been a factual invasion of First Amendment freedoms. Today the Court goes on to consider the relative scope or magnitude of the invasion as well, and the greater that magnitude the more likely that the invasion will be unconstitutional. It therefore becomes important to consider how the magnitude factor is measured in actual cases. The answer is not simple, for we are dealing here with intangibles. Basically, however, the problem is one of determining what part of the entire right has been restricted. This can be illustrated by the comparison between a statute absolutely prohibiting religious speeches in parks at any time, and one prohibiting religious speeches in parks only between 1 and 3 o'clock in the afternoons. The measurement, in other words, is not absolute like the dollar and cents measurement of property values, but is a relative measurement — a consideration of the size of the particular invasion in relation to the entire rights or freedoms available to the individual. Perhaps a few illustrations from the cases will clarify the point:

> True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the

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32 312 U.S. 287, 298 (1941).

33 310 U.S. 296 (1940).

> home from 8 p.m. to 6 a.m.[34]
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> The injunction is defended, however, on the ground that the petitioners have been prohibited from passing information to the public *at only some but not all places.*[35] (Emphasis supplied).
>
> The range of activities proscribed . . . embraces *nearly every practicable, effective means* whereby those interested . . . may enlighten the public on the nature and causes of a labor dispute.[36] (Emphasis supplied.).

In the final analysis, then, when governmental action invades spiritual integrity the magnitude of the invasion is an important factor in the decision as to constitutionality. To measure magnitude, the Court uses a relative test; How much of the particular freedom has been actually and practically proscribed?

Appropriateness of the Invasion.

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end, and those of another begin.[37]

In a society as complex as ours it is difficult to perform any significant act without in some way affecting others. Often when an individual exercises his freedom of speech, press, religion, or assembly in a particular manner, the effect is an interference with personality rights of others. The outstanding example of this is Individual *A*'s use of a loud speaker in a public park where others are seeking quiet relaxation. While Individual *A* is thus exercising his right to speak, he is also interfering with the rights of others to enjoy peace and quiet in the public park. In such a situation, unless government intervenes to curtail the rights of Individual *A*, Individual *A* will be invading the personality rights of other individuals. The degree of probability that, unless government does step in, Individual *A* will invade the rights of others is the fundamental basis of the "appropriateness" factor. A high degree of probability makes it "appropriate" that government step in to prevent *A's* "private" invasion of others.

Probably the outstanding Supreme Court case recognizing the

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34 Korematsu v. United States, 323 U.S. 214, 218 (1944).

35 Mr. Justice Reed dissenting in Carpenters Union v. Ritters Cafe, 315 U.S. 722, 732 (1942).

36 Thornhill v. State of Alabama, 310 U.S. 88, 104 (1940).

37 West Virginia Board of Education v. Barnette, 319 U.S. 624, 630 (1943).

existence of this factor is *Saia v. New York* in which Mr. Justice Frankfurter stated in his dissent:

> But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural agression. If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation, or quiet conversation, may be disturbed or precluded by noise beyond one's personal control.
> ... Surely there is not a constitutional right to force unwilling people to listen. ... And so I cannot agree that we must deny the right of a State to control these broadcasting devices so as to safeguard the rights of others not to be assailed by intrusive noise but to be free to put their freedom of mind and attention to uses of their own choice.[38]

While Mr. Justice Frankfurter's opinion was a dissenting voice in the *Saia* case, *supra,* that case is generally regarded as having been overruled by *Kovacs v. Cooper,* in which the Court said, "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."[39]

A negative inference giving further vitality to the appropriateness factor is found in the consistency with which the Court has alluded to it in striking down legislation invading personality rights where there existed no indication of injury to others unless government interceded.[40]

Although the cases indicate that the "appropriateness" factor has a significance of its own in First Amendment cases, it may well be

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38 334 U.S. 558, 563 (1948). By the express assertion of a majority of the Justices, the *Saia* case was overruled by Kovacs v. Cooper, 336 U.S. 77 (1949).

39 336 U.S. 77, 88 (1949). Other cases in which this criterion has played a part are: Beauharnais v. Illinois, 72 S.Ct. 725, 732-733 (1952); Niemotko v. Maryland, 340 U.S. 268, 279 and cases there cited (1951); Kovacs v. Cooper, 336 U.S. 77, 86, 88, 97 (1949); Railway Express v. New York, 336 U.S. 558 (1948); dissenting opinion in Prince v. Massachusetts, 321 U.S. 158, 177 (1944); West Virginia Board of Education v. Barnette, 319 U. S. 624, 630 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).

40 STRONG, AMERICAN CONSTITUTIONAL LAW 818-819 (1950). Professor Strong lists the following cases as supporting this negative inference: West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 630 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296, 308-309 (1940); Schneider v. State, 308 U.S. 147, 162 (1939). Professor Strong also quotes from CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941): "The only sound explanation of the punishment of obscenity and profanity is that the words are criminal, not because of the ideas they communicate, but like acts because of their immediate consequences to the five senses."

that in reality it is merely another way of considering magnitude through a net effect approach. The Court, in other words, not only looks at the magnitude of the government's invasion of Individual *A's* rights, but goes beyond to see whether Individual *A* will invade the rights of others if he is not stopped. Although this second inquiry is not stated in terms of magnitude, what the Court apparently wants to accomplish is a "net" saving of personality rights. By asking whether the invasion of *A's* rights can be overbalanced by the saving of the rights of others, the Court arrives at a net result in terms of magnitude. The recent case of *Beauharnais v. Illinois*[41] seems based partly at least on this type of reasoning. In that case the Supreme Court upheld an Illinois group libel statute under which the defendant had been convicted for defaming Negroes as a race. The Court in the opinion recognized that although the defendant's rights were being invaded the rights of the entire Negro race were being protected. The net saving idea is readily apparent.

This indirect consideration of magnitude through the "appropriateness" factor is perhaps necessitated by the fact that the First and Fourteenth Amendments cannot be directly used to prevent "private" invasions of the rights of others. As a result, the Court is forced to validate legislation providing protection against individuals or private invasions of personality rights, or leave private invasions completely unrestricted.

Public Interest

Since the Court has often stated that First Amendment freedoms are not absolutes,[42] the problem in each case is one of deciding when the limits of the protection accorded those freedoms have been reached. As stated earlier the Court's present answer is a balancing process in which the individual interest is weighed against the public interest. Although a particular case may involve a governmental invasion of First Amendment freedoms which is of great magnitude and not "appropriate," the Court may still decide that the invasion is justified by an overriding public interest in achieving the government's objective. That public interest must, of course, be one of genuine importance to all the public.[43] Broken down, this is a re-

41 72 S.Ct. 725 (1952).

42 "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes." United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 95 (1947) and cases there cited in note 30.

43 "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the *interest of all . . .*" (Emphasis supplied). Hague v. C.I.O., 307 U.S. 496, 515 (1939); "Where a restriction of the use of highways in that relation is designed to promote the

quirement that there be not only a "factual" public interest, but that it also be of enough importance to society to overweigh the individual interest which has been invaded. The method used to weigh the public interest side of the balancing process is very similar to that used to weigh the individual interest side — first the Court determines whether or not there is a factual public interest, and then, if one is found, they weigh its importance to society through a consideration of several factors. This side of the balancing process will be considered in detail below.

A Factual Public Interest.

Obviously governmental action aimed at an unconstitutional objective can contain no real or factual public interest, and will not be upheld by the Court. In purely economic affairs the Supreme Court has indicated by its repudiation of the anti-monopoly bias in the "due process" clause that apparently government is completely free in its choice of policy. Where civil liberties are involved, however, the Court has set definite limits on the government's choice of policy. Although objectives of a wide variety have been held permissible even when civil liberties are involved,[44] governmental choice

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public convenience *in the interest of all,* it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." (Emphasis supplied). Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

44 Protection of the public peace and the primary uses of streets and parks, Feiner v. New York, 340 U.S. 315 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Railway Express v. New York, 336 U.S. 106 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Davis v. Massachusetts, 167 U.S 43 (1897). Protection of the war effort and prevention of sabotage, Korematsu v. United States, 323 U.S. 214 (1944); Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921); Gilbert v. Minnesota, 254 U.S. 325 (1920); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919). Prevention of overthrow of government by force, Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); through protection of the school system, Adler v. Board of Ed. of City of New York, 72 S. Ct. 380 (1952). Prevention of recurrence of violence during picketing, Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941). Prevention of coercion of employees' choice of bargaining representative, Building Service Union v. Gazzam, 339 U.S. 532 (1950). To encourage self-employed persons, Teamsters Union v. Hanke, 339 U.S. 470 (1950). To prevent racial discrimination through picketing, Hughes v. Superior Court of California, 339 U.S. 460 (1950). To further State's anti-trust policy, Giboney v. Empire Storage Co., 336 U.S. 490 (1949); Carpenters Union v. Ritter's Cafe, 315 U.S. 722 (1942). To prevent unfair labor practices, Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937). To prevent interference with the course of justice, Patterson v. Colorado, 205 U.S.

of policy which is inconsistent with dynamic democracy has been repeatedly declared unconstitutional.[45] Government cannot prohibit full competition in ideas of any sort. Once again statements of the Court best illustrate this development:

> . . . stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.[46]
> The right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, all places, and under all circumstances.[47]
> It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed.[48]
> What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs. Under our decisions criminal sanctions cannot be imposed for such communications.[49]
> A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.[50]
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .[51]

Concisely summarized, these judicial expressions establish that

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454 (1907). Protection of children, Prince v. Massachusetts, 321 U.S. 158 (1944). To protect interstate commerce from the threat of political strikes and labor unrest, American Communications Association v. Douds, 339 U.S. 382 (1950). To prevent influencing by or of government employees during elections, United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947). To prevent race defamation, Beauharnais v. Illinois, 72 S. Ct. 725 (1952).

45 Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290, 293 (1951); Winters v. New York, 333 U.S. 507, 509, 512 (1948); West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943); A.F. of L. v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106, 112 (1940); Hague v. C.I.O., 307 U.S. 496, 515, 517 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938); De Jonge v. Oregon, 299 U. S. 353, 365 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936); Stromberg v. California, 283 U.S. 359, 369 (1931); Fiske v. Kansas, 274 U.S. 380, 386 (1927).

46 Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

47 Jamison v. Texas, 318 U.S. 413, 416 (1943).

48 De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

49 Taylor v. Mississippi, 319 U.S. 583, 590 (1943).

50 A.F. of L. v. Swing, 312 U.S. 321, 326 (1941).

51 West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

"government cannot longer choose to forbid either the interchange or the consequences of unpopular political, economic, social, and religious ideas."[52]

In this connection the many cases in which vague and indefinite statutes have been held unconstitutional again become significant, for one of the reasons these statutes are invalidated is that they prohibit not only activities which the State may constitutionally proscribe, but also those activities which government has no right to prohibit. As stated by the Court, "It is settled that a statute so vague and indefinite, in form and as interpreted, so as to permit within the scope of its language the punishment of incidents fairly without the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."[53]

Since objectives inconsistent with dynamic democracy have no factual public interest and are thus unconstitutional when there has been an invasion of civil rights, it is relevant to consider how the government determines what the objective of particular governmental action is. Does the Court accept the profession of purpose by the legislature, or does it go beneath the surface to determine whether or not there is an underlying motive different from that profession? Or perhaps the legislature may have sincerely intended its profession of purpose, but the statute is so drawn that it could be administered in such a way as to achieve a forbidden purpose. Will the Court consider this administratively-possible purpose as the real objective?

Although each of these three referents — legislative profession, actual legislative purpose, and administratively-possible purpose — has been used in the decision of First Amendment cases, there is today no clear-cut rule. In the economic field, where the problem first arose, there is a long standing rule that the Court will accept legislative profession,[54] a necessary corollary to the "presumption of constitutionality" accorded economic legislation. At first it was felt that the same rule might apply in the civil rights area, but beginning with a

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52 STRONG, AMERICAN CONSTITUTIONAL LAW 893 (1950).

53 Winters v. New York, 333 U.S. 507, 509 (1948). Other cases which have held broad, vague or indefinite statutes unconstitutional are: Niemotko v. Maryland, 340 U.S. 268 (1951); Termienello v. Chicago, 337 U.S. 1 (1949); Thomas v. Collins, 323 U.S. 516 (1945); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); De Jonge v. Oregon, 299 U. S. 353 (1937); Herndon v. Lowry, 301 U.S. 242 (1937); Stromberg v. California, 283 U.S. 359 (1931).

54 Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); United States v. Carolene Products Co., 304 U.S. 144 (1938); Nebbia v. New York, 291 U.S. 502, 537, 538 (1934); Price v. Illinois, 238 U.S. 446, 451, 452 (1915); Powell v. Pennsylvania, 127 U.S. 678, 685 (1888); Mugler v. Kansas, 123 U.S. 623, 660-661 (1886); Sinking-Fund Cases, 99 U.S. 700, 718 (1878).

casual footnote reference[55] the Court has stated several times that in this area it will look behind legislative profession to find the actual legislative purpose.[56] Other cases, while not overtly recognizing the problem, have in fact gone behind the legislative profession to find an actual legislative or an administratively-possible purpose inconsistent with dynamic democracy and therefore forbidden by the Constitution.[57]

An example of the Court's recognition of an actual legislative purpose different from the legislative profession is *Grosjean v. American Press Co.*,[58] which invalidated a gross receipts tax on advertising in newspapers. The legislature had professed that the tax was for revenue purposes, but the Court said, "It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of the Constitutional guaranties."[59]

In *Martin v. City of Struthers*[60] the Court held unconstitutional an ordinance forbidding distributors of handbills of any type to summon householders to the door to receive them. Despite the legislative profession that the purpose of the ordinance was to insure peace and quiet in a community where many worked at night and slept during the day, the Court stated: "The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."[61]

In *Hague v. C.I.O.*,[62] the Court did not deny that the legislative profession of public peace, comfort and safety was the real motive for an ordinance requiring a permit to hold public meetings in streets or other public places, but found that because of a lack of standards for granting the permits, the ordinances could be administrated in such a way as to achieve discrimination, a constitutionally forbidden purpose.

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55 United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4 (1938).

56 Thomas v. Collins, 323 U.S. 516 (1945); Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Herndon v. Lowry 301 U.S. 242 (1937).

57 Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); Grosjean v. American Press Co., 297 U.S. 233 (1936).

58 297 U.S. 233 (1936).

59 *Id.* at 250.

60 319 U. S. 141 (1943).

61 *Id.* at 147.

62 307 U.S. 496 (1939).

"It (the ordinance) does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent disturbances or disorderly assemblage. It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities."[63]

Had the cases stopped here the principle would be clear, but of late there have been cases indicating a return to the philosophy of *Gitlow v. New York* where the Court declared that "Every presumption is to be indulged in favor of the validity of the statute."[64] In *Dennis v. United States* Mr. Justice Frankfurter stated, "In other cases, moreover, we have given clear indication that even when free speech is involved we attach great significance to the determination of the legislature."[65] Since a presumption of constitutionality of necessity includes accepting legislative profession of purpose, there is at present at least a trend toward applying the same rule in this area as that applied in the economic field. This trend is given added impetus by the fact that in at least one recent case precedents from the economic field have been cited.[66] On the other hand, the language supporting this trend has been only dictum, for in none of these cases was there any doubt but that legislative profession and actual objective were the same. Until the Court does refuse to go behind profession in a civil rights case where the actual purpose of the legislature could easily be different from that professed, it must be assumed that government's professed objective is always suspect.

Whichever referent for finding objective the Court uses, if the objective found is inconsistent with dynamic democracy the governmental action will be unconstitutional because there can be no "factual" public interest connected with it. The mere finding of a constitutionally permitted objective, however, does not always mean constitutionality. The problem of weighing that factual public interest

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63 *Id.* at 516. A further illustration of this type of administratively-possible forbidden purpose is Niemotko v. Maryland, 340 U.S. 268 (1951).

64 268 U.S. 652, 668 (1925). Other cases indicating a return to this philosophy are: Dennis v. United States, 341 U.S. 494 (1951) (see concurring opinion of Mr. Justice Frankfurter at 538-542 for discussion of the problem); Teamsters Union v. Hanke, 339 U.S. 470, 475 (1950); American Communications Association v. Douds, 339 U.S. 382, 400 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Kovacs v. Cooper, 336 U.S. 77, 90-95 (1949) (concurring opinion of Mr. Justice Frankfurter); Gitlow v. New York, 268 U.S. 652, 668 (1925); Whitney v. California, 274 U.S. 357 (1926).

65 341 U.S. 494, 540 (1951).

66 Dennis v. United States, 341 U.S. 494, 525 (1951) citing the following cases: "Sinking Fund Cases, 99 U.S. 700, 718; Mugler v. Kansas, 123 U.S. 623, 660-661; United States v. Carolene Products Co., 304 U.S. 144."

still remains, and that problem is solved by the Court's consideration of the factors below.

Substantive Importance of Government's Objective.

There are many constitutionally permissible objectives even in the civil rights area, and they vary greatly in their substantive importance to society. The degree of substantive importance of the objective of particular governmental action is a major consideration in deciding whether or not there is enough public interest in that action to override any private invasion of personality rights which it entails. Of necessity a decision as to substantive importance is a value judgment. In First Amendment cases that value judgment is made with the knowledge that what government is trying to justify or override is an invasion of freedoms always deemed of vital importance to our democratic society.[67] Because of this, many objectives may be constitutionally permitted, but yet not of enough substantive importance to society to justify restrictions on First Amendment freedoms. This the Court has expressly recognized:

> We first note that many of the cases in which this Court has reversed convictions by use of this (clear and present danger) or similar tests have been based on the fact that the interest which the State was attempting to protect was itself *too insubstantial to warrant restriction of speech.*[68] (Emphasis supplied).

Most of the case language concerning this factor has been in the negative, that unless governmental action is aimed at preventing a serious evil it is unconstitutional:

> Since that time this Court has decided that however great the likelihood that a substantial evil will result, restrictions on speech and press cannot be sustained unless the evil itself is

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67 In Niemotko v. Maryland, 340 U.S. 268 (1951) Mr. Justice Frankfurter in his concurring opinion at 278-282 discusses the cases from this point of view, comparing the importance to society in achieving the objective of the governmental action involved as against the importance of the individual interests invaded by that action.

68 Dennis v. United States, 341 U.S. 494, 508 (1951). The Court there lists the following cases as those in which the interest the State was attempting to protect was too insubstantial to warrant restrictions on speech: Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Martin v. Struthers, 319 U.S. 141 (1943); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Marsh v. Alabama, 326 U.S. 501 (1946).

> *"substantial"* and *"relatively serious"* . . . . or sometimes *"extremely serious"* . . . . And it follows therefrom that even harmful conduct cannot justify restrictions upon speech unless *substantial interests of society* are at stake.[69] (Emphasis supplied).

The essential idea is that since First Amendment freedoms are themselves so tremendously important to a free society, the Court will require that the goal of governmental action invading those freedoms be at least as important to our society as the freedoms destroyed. "Charges (published) of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication."[70]

Of great significance here, in this writer's opinion, is a recent development, highlighted by the picketing cases, to the effect that when speech is an integral part of conduct it may be subjected to restrictions not because of any evil which the speech may occasion, but because of some evil that may be brought about by the conduct of which the speech is a part. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an *integral part of conduct* in violation of a valid criminal statute. We reject that contention now."[71] (Emphasis supplied). Historically the First Amendment was initially applied in situations where speech itself was being restricted to prevent some evil directly attributable to speech. Such evils are limited in number, interference with government being the chief among them as illustrated by the Espionage cases. The result was that governmental action aimed directly at speech could have only a few possible legitimate objectives, and the problem of measuring the substantive importance of those objectives was not too difficult. When we recognize that speech can be and is an integral part of much of our everyday conduct, however, the problem becomes much more complex. Government may have a great variety of objectives in regulating conduct, and of course a regulation of conduct necessarily affects any speech which is an integral part of that conduct. When the First Amendment is invoked in these cases the problem is no longer the simple one of a statute aimed directly at

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69 American Communications Association v. Douds, 339 U.S. 382, 397 (1950). Other examples are: "Moreover, even imminent danger cannot justify resort to prohibition of these functions [free speech and assembly] unless the evil apprehended is relatively serious." Whitney v. California, 274 U.S. 357, 374, 377 (1926); "The easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean. This could scarcely justify prohibiting the dissemination of information by handbills or censoring their contents." Niemotko v. Maryland, 340 U.S. 268, 276 (1951).

70 Near v. Minnesota, 283 U.S. 697, 722 (1931).

71 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

speech to prevent an evil resulting from speech alone. Since the early 1930's First Amendment protection has been claimed in many of these hybrid situations, and the Court, by recognizing the applicability of the First Amendment, has opened up a whole new area of legitimate objectives for governmental action directly restrictive of conduct and only indirectly restrictive of speech. Since these objectives may vary greatly in their substantive importance to society, the Court's value judgment as to this factor becomes of great importance in this hybrid area. A few quotations from the Court should clarify this proposition:

> It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives grounds for its disallowance.[72] Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.[73]
> Section 9 (h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct. . . .[74]

The granting of First Amendment protection in these hybrid situations has forced the Court to adjust its position somewhat. Pure speech can give rise to only a relatively few evils — espionage, sedition, interference with a war effort, and perhaps defamation. Restrictions imposed directly upon pure speech, on the other hand, can very easily prevent the dissemination of valuable ideas. Thus the Court could require a large degree of substantive importance before a government objective could justify invasions of pure speech, and the efficiency of government would not be seriously hampered. When dealing with speech as an integral part of conduct, however, government may have to face a whole new variety of evils, for example all the possible economic evils including strikes, violence in picketing, interference with commerce, and the promotion of monopoly. In this area, furthermore, governmental action honestly aimed at restricting conduct, though it may incidentally interfere with speech, contains little danger of preventing the dissemination of pure ideas. As a result the Court in this hybrid type of situation has not required the great degree of substantive importance to society that it requires in the pure speech area. Apparently the Court has felt that so strict a requirement would render government ineffective.

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72 Hughes et al. v. Superior Court of California, 339 U.S. 460, 465 (1950).

73 Bakery Drivers Local v. Wohl, 315 U.S. 769, 776 (1942).

74 American Communications Association v. Douds, 339 U.S. 382, 396 (1950).

Nexus Between Governmental Action and Objective.

The nexus or connection between governmental action and its objective is an important factor in weighing the public interest of that governmental action. Although governmental action may be honestly aimed at a permitted objective of substantial importance to society, the problem still remains of how closely the legislature's choice of a method or route for reaching that objective is connected with that objective. Is there overwhelming evidence that this mode of governmental action will always achieve its objective and only its objective; does the evidence indicate only a 50-50 chance the objective will be reached; or is there merely a quantum of evidence that the objective will be reached? Obviously, the stronger the evidence that the objective and only the objective will be reached the greater the public interest, and correspondingly the more likely that the governmental action will be constitutional.

An understanding of the present significance of the nexus factor can only be achieved through an historical approach, for of all the factors involved in First Amendment cases, nexus has been the most consistently considered and the most consistently confused.[75] To add to the confusion, nexus has rarely been considered in its isolated form, but has been tied up with other factors and considered together with them through the now famous "clear and present danger" test laid down by Mr. Justice Holmes in what was perhaps the first significant First Amendment Case, *Schenck v. United States*:[76]

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[77]

As thus formulated the test required a permitted objective of considerable substantive importance as well as an immediate nexus or overwhelming evidence that the governmental action chosen would reach its objective in the particular situation before the Court. While the "clear and present danger" test has continued to represent a consideration of at least these three factors, we will here consider it only as it is pertinent to the nexus factor alone. In this connection, as in-

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75 "I must leave to others the ungrateful task of trying to reconcile all these decisions." Mr. Justice Frankfurter concurring in Dennis v. United States, 341 U.S. 494, 539 (1951).

76 249 U.S. 47 (1919).

77 *Id.* at 52. For discussion of the clear and present danger test see: Corwin, *Freedom of Speech and Press Under the First Amendment*, 30 YALE L. J. 48 (1920); Goodrich, *Does the Constitution Protect Free Speech?* 19 MICH. L. REV. 487 (1921).

dicated above, it required a showing of overwhelming evidence that the individual's acts would culminate immediately in a serious evil if governmental intercession was to be constitutional. This was a stringent requirement, and, if applicable to every First Amendment case, it foreclosed the use of a balancing process because of that stringency.

Since the *Schenck* case, *supra,* the clear and present danger test has had a rather complicated history. In the later World War I espionage cases it was at first reiterated, but the last of these cases found Mr. Justice Holmes, joined by Mr. Justice Brandeis, dissenting from conviction on the ground that there had been no finding of a clear and present danger.[78] In the years which have followed the Court at times has upheld governmental action which could not possibly meet the stringent requirements of the test, although the Court apparently felt it was using it,[79] at other times it has distinguished the test,[80] or expressly rejected it,[81] while on still other occasions it has

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78 The Justices dissented in Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920).

79 Feiner v. New York, 340 U.S. 315 (1951); Prince v. Massachusetts, 321 U.S. 158 (1944).

80 ". . . it would be sheer folly as a matter of governmental policy for an existing government to refrain from inquiry into potential threats to its existence or security until danger was clear and present." Barsky v. United States, 167 F. 2d 241 (App. D.C.), *cert. denied,* 334 U.S. 843 (1948); "For regulation of employees it is not necesasry that the act regulated be anything more than an act *reasonably deemed by Congress* to interfere with the efficiency of public service." (Emphasis supplied). United Public Workers of America v. Mitchell, 330 U.S. 75, 101 (1947); "It [the state] cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment, suppress the threatened danger in its incipiency." Gitlow v. New York, 268 U.S. 652, 669 (1925).

81 "This confusion suggests that the attempt to apply the term 'clear and present danger,' as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application, mistakes the form in which an idea was cast for the substance of the idea. . . . It is the consideration that gave birth to the phrase, 'clear and present danger,' not the phrase itself that are vital in our decision of questions involving liberties protected by the First Amendment." American Communications Association v. Douds, 339 U.S. 382, 394 (1950); Railway Express v. New York, 336 U.S. 106, 109 (1949) where the Court stated that to invalidate the ordinance before it would be to hold "that this regulation had *no relation* to the traffic problem of New York City." (Emphasis supplied); "Libellous utterances, not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase 'clear and present danger.' Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class." Beauharnais v. Illinois, 72 S.Ct. 725, 735 (1952).

emphatically affirmed it,[82] and finally it has often simply ignored the test.[83] In addition the Court has switched from its early emphasis on the actions of the individuals being acted against by government[84] to a present emphasis on the overall effect of the governmental action being considered. Today, even though government may establish the required nexus in a given case as to the individual before the Court, if the statute could possibly be used to accomplish a non-permitted objective, or if its thrust could possibly reach individuals for whom the required nexus could not be shown, the statute must fall.[85] High-

82 Termienello v. Chicago, 337 U.S. 1 (1949) (sometimes regarded as requiring an even stricter test than clear and present danger); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Craig v. Harney, 331 U.S. 367 (1947); Thomas v. Collins, 323 U.S. 516 (1945); Korematsu v. United States, 323 U.S. 214 (1944); Hartzel v. United States, 322 U.S. 680 (1944); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Schneiderman v. United States, 320 U.S. 118 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943); Bridges v. California, 314 U.S. 252 (1941); A.F. of L. v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937).

83 Kunz v. New York, 340 U. S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Building Service Union v. Gazzam, 339 U.S. 532 (1950); Teamster's Union v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court of California, 339 U.S. 460 (1950); Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); Winters v. New York, 333 U.S. 507 (1948); *In re* Summers, 325 U.S. 561 (1945); Cafeteria Union v. Angelos, 320 U.S. 293 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Valentine v. Chrestensen, 316 U.S. 53 (1942); Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters Union v. Ritter's Cafe, 315 U.S. 722 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Drivers Union v. Meadowmoore Co., 312 U.S. 287 (1941); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); Associated Press v. National Labor Relations Board, 301 U.S. 103 (1937); De Jonge v. Oregon, 299 U.S. 353 (1937); Grosjean v. American Press Co., 297 U.S. 233 (1936); Whitney v. California, 274 U.S. 357 (1926); Milwaukee Publishing Co. v. Burleson, 255 U.S. 407 (1921); Gilbert v. Minnesota, 254 U.S. 325 (1920). Of course some of these decisions held governmental action unconstitutional even though the clear and present danger test was not mentioned.

84 "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." Mr. Justice Holmes dissenting in Abrams v. United States, 250 U.S. 616, 628 (1919). "The question in every case is whether *the words used* are used in such circumstances and are of such a nature as to create a clear and present danger. . . . " Schenck v. United States, 249 U.S. 47, 52 (1919).

85 "The statute requires no specific formula. It is not contended that only the use of the word 'solicit' would violate the prohibition. Without such a limitation the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation." Thomas v. Collins, 323 U.S. 516, 534 (1946). "Petitioner was not convicted under a statute so narrowly construed. For all anyone knows he was convicted under the parts of the ordinance (as construed) which, for example, makes it an offense merely to invite dispute or to bring about a condition of unrest." Termieniello v. Chicago, 337 U.S. 1, 6 (1949).

lighted by the *Termieniello* case, this new emphasis has led some observers to conclude that only a breakdown in society can justify governmental invasion of First Amendent Freedoms.[86] Recent cases, however, hardly justify that conclusion.

The many approaches which the Court has adopted toward the nexus factor make it obvious that the cases cannot be lined up to reach a set of mathematical rules. Although the cases indicate a striving for certainty, chiefly through the use of the clear and present danger test as an automatic formula, the Court has been unable to achieve it, even as to the nexus factor. Instead, the Court has placed increasing emphasis on the fact that in the civil liberties area only a balancing process can provide a satisfactory answer. This rules out the clear and present danger test or any other rigid principle. "This conflict of interests cannot be resolved by a dogmatic preference for one or the other, or by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict. If adjudication is to be a rational process, we cannot escape a candid examination of the conflicting claims with full recognition that both are supported by weighty titledeeds."[87]

Apparently here as with other factors difficulty arose when the Court in the 1930's began to recognize claims of First Amendment freedoms in hybrid situations, where speech and conduct were tied together and speech is interfered with only because of an attempt to regulate conduct. In the early cases concerned with the pure speech situations, the Court knew that government need fear only a few evils and that there was much danger from allowing restrictions on pure speech. Therefore the rigid requirements of the clear and present danger test were appropos. With the granting of First Amendment protection to the hybrid situation, however, much more complex issues were raised. Now government might have to act against a great variety of evils flowing from conduct and still face the challenge that First Amendment freedoms were being indirectly curtailed. Furthermore, allowing government to act in these situations did not present the danger of interfering with the dissemination of ideas that regulation of pure speech presented. As the late cases indicate, the Court has un-

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[86] This has been the common interpretation given to Termieniello v. Chicago, 337 U.S. 1 (1949), and was the view advocated by Dr. Alexander Meiklejohn in MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT chap. 2 (1948). According to Dr. Meiklejohn, "The only allowable justification of it [suppression of the interchange of ideas] is to be found, not in the dangerous character of a specific set of ideas, but in the social situation which, for the time, renders the community incapable of the reasonable consideration of the issues of policy which confront it." *Id.* at 54-55.

[87] Dennis v. United States, 341 U.S. 494, 519 (1951). For other cases repudiating a rigid rule and emphasizing the necessity of a balancing process see cases cited note 3 *supra.*

doubtedly abandoned the clear and present danger test, at least in the hybrid situations, and now employs a balancing process of weighing the individual interest as against the public interest through a consideration of many factors of which nexus is only one.[88] While it is true that the Court still clings to the verbal formulation, "clear and present danger," the recent case of *Dennis v. United States*[89] which adopted Judge Learned Hand's statement of the rule indicates it is no longer a rigid test, but a balancing process. As Judge Learned Hand stated it:

> In each case (courts) must ask whether the *gravity* of the "evil," discounted by its *improbability,* justifies *such invasion* of free speech as is necessary to avoid the danger.[90] (Emphasis supplied).

Significantly the Supreme Court itself said, "As articulated by Chief Judge Hand, it is as succinct and *inclusive* as any other we might devise at this time. It takes into consideration *those factors* which we deem relevant, and relates *their significance.* More we cannot expect from words."[91] (Emphasis supplied).

Thus, today, whether or not the Court uses the words "clear and present danger," what is meant is a balancing process rather than a rigid rule. Nexus is only one factor considered in that process, though it may be stated that the closer the nexus between governmental action and its objective, the more likely that governmental action will be constitutional.

Basis Used to Establish Nexus.

In establishing the nexus or connection between governmental action and its objective, government may have relied on the characteristics of the separate individuals coming within the scope of the regulations, or it may have relied on the characteristics of a class to justify regulation or restrictions on every member of that class regardless of whether they, as individuals, possess the class characteristics. At one time class basis or "guilt by association" was thought to be unconstitutional in the civil liberties area, but, since the late 1940's at least, this is no longer true. As with the other factors already discussed, basis is only one element to be considered in determining whether the

88 The writer wishes to repeat that this comment is in no way an attempt to discuss the wisdom of this new attitude.

89 341 U.S. 494 (1951).

90 *Id.* at 510.

91 *Ibid.*

public interest in allowing governmental action overrides the individual interest in preventing the invasion of that action. While an individual basis for governmental action certainly adds much more weight to the public interest in that action, in given situations the other factors may be such that even the class basis for legislation will be enough to override the particular invasion of individual freedoms involved.

While some authorities feel that recent cases indicate that "guilt by association" is permissible in every First Amendment situation, it is submitted that every one of the cases in which the Court has validated the class basis has been one involving the hybrid situation where what is aimed at is conduct, and restrictions on First Amendment rights are only incidental. The most recent case is *Adler v. Board of Education of New York*[92] which sustained the constitutionality of New York's civil service law. The New York Act, as implemented by the Feinberg Law, denied the privilege of employment in the school system on the ground of unexplained membership in any organization found to teach and advocate overthrow of government by force or violence. What the restriction was aimed at was the indoctrination or teaching of propaganda to school children. The Court said: *"In the employment of officials and teachers of the school system,* the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."[93] (Emphasis supplied). Here the Court was dealing with the hybrid situation, for speech in and of itself was not restricted, only speech used as an integral part of *teaching* was affected.

Other outstanding cases approving the use of the class basis have also involved the hybrid situation. The *Douds* case[94] which permitted the use of the characteristics of Communists as a class to justify governmental restrictions of labor unions was aimed at the *conduct* of political strikes. The *Mitchell* case[95] which permitted justification of the Hatch Act by the traits of federal employees as a group was aimed at the *conduct* of influencing elections.

Illustrative of the conclusion that the permissability of class basis depends on the result of a balancing process rather than a strict rule or formula is the group of cases dealing with classification by race. When faced with governmental action directly restrictive of political rights the Courts invalidated the class basis. The case was *Nixon v.*

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92 72 S. Ct. 380 (1952).
93 *Id.* at 385.
94 339 U.S. 382 (1950).
95 330 U.S. 75 (1947).

Herndon,[96] invalidating a Texas statute which provided that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas." The Court said:

> States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.[97]

On the other hand, segregation of races, the equivalent of class basis, is still permissible in education and public accomodations so long as "equal facilities" are afforded.[98] Clearly the answer is gotten only on the balancing of many factors.

In *Korematsu v. United States*[99] the class basis was used to demonstrate the necessity of excluding the Japanese people from the West Coast. While the Court upheld this instance of "guilt by association," it clearly indicated that it did so only because of the war emergency.

The only conclusion of these cases is that basis is only one factor in a balancing process. While the individual basis provides more weight to public interest than does class basis, in certain situations even class basis may be sufficient.

SYNTHESIS

We have seen that a decision as to the constitutionality of governmental action invading First Amendment freedoms depends upon a consideration and weighing of all of the factors which may be involved in a particular case. Only then can the Court decide whether or not the public interest in permitting the action outweighs the individual interest in preventing the invasion.

Perhaps the familiar teeter-totter analogy of the law will best illustrate how the factors are interrelated in First Amendment cases:

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96 273 U.S. 536 (1927). Other cases invalidating classification by race are Shelley v. Kraemer, 334 U.S. 1 (1948); Buchanan v. Warley, 245 U.S. 60 (1917); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

97 *Id.* at 541.

98 State of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); McAbe v. Atchison, Topeka & Santa Fe Railway Co., 235 U.S. 151 (1914); Fisher v. Hurst, 333 U.S. 147 (1948); Plessy v. Ferguson, 163 U.S. 537 (1896).

99 323 U.S. 214 (1944).

INDIVIDUAL INTEREST	PUBLIC INTEREST
Nature of Aspect Invaded	Substantive Importance of Objective
Magnitude of the Invasion	Nexus between Action and Objective
Appropriateness of the Invasion	Basis Used to Establish Nexus

After a finding of a factual invasion of First Amendment freedoms, the individual interest side is weighed by a consideration of the nature of the aspect invaded, the magnitude of the invasion, and the appropriateness of the invasion. Then the Court determines whether or not there is a factual public interest by determining whether or not the governmental action has a constitutionally permitted objective. If it has, the public interest side is weighed by a consideration of the substantive importance of the objective, the nexus between that objective and the governmental action, and the basis used to establish nexus. If the individual interest side weighs the heaviest, governmental action is unconstitutional; if the public interest side weighs the heaviest, governmental action is constitutional.

It should be emphasized that although each Justice normally considers all the pertinent factors in a case, the weight that he assigns to each factor is a value judgment and consequently may differ from that of every other Justice. In addition the relative importance which each Justice assigns to the factors is the result of a value judgment on his part and may differ from that of the other Justices. With this in mind, a consideration of several cases should shed light on the normal interrelation of the factors.

In *American Communications Association v. Douds*[100] the Court sustained the constitutionality of Section 9 (h) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947. Section 9 (h) imposed restrictions on and denied benefits to any labor organizations whose officers had not filed so-called "non-Communist" affidavits with the National Labor Board. In reaching its decision, the Court overtly considered four factors. First, it recognized that First Amendment freedoms had been invaded: " . . . Section 9 (h) . . . has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment."[101] This established

100 339 U.S. 382 (1950).
101 *Id.* at 393.

a factual invasion, and the Court then considered magnitude in order to weigh the individual interest involved. It found it slight: "When the *effect* of a statute or ordinance upon the exercise of First Amendment freedoms is *relatively small* . . . . "[102] After recognizing that government's objective was a permitted one (indicating a factual public interest) the Court considered the substantive importance of that objective in order to weigh the public interest: "That Act was designed to remove obstructions (to Interstate Commerce) caused by strikes and other forms of industrial unrest."[103] The Court then recognized that only a reasonable rather than immediate nexus existed between objective and legislation, and that that nexus was established on a class basis: "We think it is clear, in addition, that the remedy provided by Section 9 (h) bears *reasonable relation* to the evil which the statute was designed to reach. Congress could rationally find that the *Communist Party is not like other parties* in its utilization of positions of union leadership. . . . "[104] The Court emphasized that the decision in the case could only be reached through a balancing process,[105] and decided that, because the invasion of Section (9)h was so slight in terms of magnitude, the important objective of government overrode the invasion even though there was only a reasonable nexus established on a class basis: "When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity."[106]

A case similar in its synthesis of the factors is *United Public Workers of America (C.I.O.) v. Mitchell*[107] which upheld the constitutionality of the Hatch Act. Here, too, the Court acknowledged a factual invasion of First Amendment freedoms: "The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments."[108] The Court felt, however, that the magnitude of the invasion of those freedoms would be slight: "Congress . . . leaves untouched full participation by employees in political

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102 *Id.* at 397.

103 *Id.* at 387.

104 *Id.* at 390.

105 "When particular conduct is regulated in the interest of public order, and the regulation results in an . . . abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *Id.* at 399.

106 *Id.* at 397.

107 330 U.S. 75 (1947).

108 *Id.* at 94.

decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the Act."[109] The objective of the Hatch Act, on the other hand, the Court felt to be extremely important: "To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a *material threat to the democratic system.*"[110] (Emphasis supplied). The Court then recognized that here the class basis had been used: "Evidently what Congress feared was the cumulative effect on employee morale of political activity by *all employees* who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation."[111] (Emphasis supplied). On balance, then, the Court felt that because of the slight magnitude of the invasion and the substantive importance of the objective, this was a situation where even a reasonable nexus and a class basis provided sufficient public interest to override the invasion: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of public service."[112]

While both the *Douds* and the *Mitchell* cases involved hybrid situations, where regulation of conduct only incidentally invaded First Amendment freedoms, the recent case of *Beauharnais v. Illinois*[113] involved a pure First Amendment situation and yet was treated by the Court in much the same fashion as the *Douds* and *Mitchell* cases. In the *Beauharnais* case the Court upheld the constitutionality of an Illinois criminal libel statute which prohibited the exhibition of lithographs portraying lack of virtue of a class or race and liable to cause violence and disorder. The Court considered the individual interest low in the situation because of its weighing of two factors. In considering the aspect invaded, the Court found that the type of speech prohibited contained no social interest, and so like cursing deserved little protection: "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances [clear and present danger]. Libel, as we have seen, is in the same class."[114] The Court further considered this particular invasion very appropriate. While it recognized that certain individuals such as Beauharnais might be precluded from speaking in a certain way, the Court pointed out that unless government interceded the

109 *Id.* at 99.
110 *Id.* at 99.
111 *Id.* at 101.
112 *Id.* at 101.
113 72 S.Ct. 725 (1952).
114 *Id.* at 735.

economic and civil rights of a whole class or race of people (here the colored race) might be affected by those individuals. On balance, the Court felt that the public interest in permitting this regulation overrode the invasions involved. It recognized that an objective of substantive importance was involved, and therefore felt that even a rational nexus or relation was sufficient in the situation: "Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power."[115]

Thus, whether faced with a hybrid economic civil liberty or a pure civil liberty case, the Court today uses a balancing process to decide First Amendment cases.

CONCLUSION

Since 1919 when the first important First Amendment decision was handed down, judicial implementation of First Amendment protection has undergone a significant metamorphosis. Early cases involved what may be termed pure First Amendment situations — a freedom was directly restricted or regulated because of a fear of some evil directly attributed to the use of that freedom. These situations could involve only a relatively few evils such as espionage, while direct restrictions on freedoms such as speech seemed repugnant to our idea of democracy, and involved great danger of losing those freedoms. Applying the "clear and present danger" test laid down by Mr. Justice Holmes, the Court used a rigid type of determination in these cases. If a factual invasion of freedoms was shown, no matter how slight its magnitude or thrust, governmental action was declared unconstitutional unless it could meet the "clear and present danger" test. That test required an objective of great substantive importance to society and overwhelming evidence or an immediate nexus between that objective and governmental action.

In the 1930's, however, there began a metamorphosis in the Court's attitude toward First Amendment cases. Our society had become a complex one, and people demanded more and different services from government. Individuals who felt the thrust of this increased government regulation began to assert First Amendment protection in the hybrid or civil liberty situations, where governmental action was intended to regulate conduct, but also regulated speech or other freedoms because they were an integral part of that conduct. The Court was in

[115] *Id.* at 734.

a difficult position. If they granted First Amendment protection and applied the rigid "clear and present danger" test, governmental efficiency in our complex society would be threatened. On the other hand, individuals seemed entitled to more protection in these situations than they could receive if they were labeled as purely economic situations, and First Amendment protection refused. As a result, the First Amendment was recognized as applicable, but a new and flexible method of determination as to constitutionality was adopted. Now the Court began to consider the aspect of personality invaded, the magnitude of the invasion, and its appropriateness to measure the individual interest; and the substantive importance of the objective, the nexus between objective and action, and the basis used to establish nexus to measure the public interest. A consideration of these factors enabled the Court to balance the individual interest as against the public interest and reach their decision as to constitutionality on the basis of the result.

At first this new balancing process was reserved for use in the hybrid or so-called economic civil liberty cases, while the rigid "clear and present danger" test was apparently still to be applied in pure First Amendment situations. In 1951, however, the Court had to face a difficult decision in the case of *Dennis v. United States*.[116] This involved what many deemed the most serious threat Democracy has ever had to face, Communism. While the Court in language retained the "clear and present danger" test, the members of the Court and most authorities who have written on the question have differed violently as to whether it was actually and meaningfully applied. To this writer, the true significance of the decision is that it marked the climax of a struggle on the part of certain Justices to abandon the rigid "clear and present danger" test even in pure First Amendment situations. A significant statement of an outstanding authority on Constitutional Law, Paul Freund, was quoted by Mr. Justice Frankfurter in his concurring opinion in the case:

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors; the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the

116 Dennis v. United States, 341 U.S. 494 (1951).

> strands in the web of freedoms which the judge must disentangle.[117]

That the balancing process has won out over the "clear and present danger" test is even more clearly indicated by the 1952 case of *Beauharnais v. Illinois*.[118] Again the Court was faced with a pure First Amendment case dealing with defamation, but this time in an opinion written by Mr. Justice Frankfurter the "clear and present danger" test was deliberately laid aside. As indicated earlier in this comment, the Court considered several factors and specifically approved "their *'tendency* to cause breach of the peace'," and "a choice of policy, provided it is *not unrelated* to the problem. . . ."[119] (Emphasis supplied).

Whether or not this new flexible implementation of the First Amendment was ever contemplated by the authors of the Constitution is extremely doubtful. Whether or not it is wise policy has been and still is the subject of great debate. Perhaps the only answer is to repeat the words of Abraham Lincoln, "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?"

Leonard Goldberg

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117 *Id.* at 542. The passage was quoted from FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28.

118 72 S.Ct. 725.

119 *Id.* at 734.